change charges must be "...based on the cost of such change and shall not exceed nominal amounts when..." the change can be effectuated by a simple method such as computer entry.[115]

The legislative history indicates that through this provision, Congress intended to prevent cable operators from creating any disincentive to subscriber service changes.[116] Based on the plain language of the Act and its legislative history, CFA therefore believes that any rates charged for such changes can never be priced higher than cost.

D. BUNDLING PAY-PER-VIEW OR PREMIUM CHANNELS IS SUBJECT TO THE SAME REGULATION AS CABLE PROGRAMMING SERVICES

The cable industry claims that pay-per-view or premium channels offered on an "a la carte" basis are not a tier (or "cable programming service"), even when bundled together and offered as a package. It maintains this is the case whether or not the package price is the same or less than the individual price for each channel. This is simply contrary to the definition of cable programming service under the 1992 Cable Act and frustrates Congress' intent to monitor undue market power associated with bundling of services.

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[115] § 623(b)(5)(C).

[116] See House Report at 84.

Congress apparently believed that movies, video rentals and other forms of entertainment provide some minimal competition to "a la carte" programming offered on a per channel or per program basis. When "a la carte" programming is bundled together however, it becomes cable programming service, and is no longer exempt from rate regulation.[117]

Cable operators are in no way prohibited from packaging multiple channels of "a la carte" programming together under the Act. Such packages would simply no longer be considered "programming offered on a per channel or per program basis",[118] exempt from regulation, and would be subject to cable programming service regulation under § 623(c). The cable industry's concern about regulation of such packages when they are offered at a discount price is unwarranted. Regulation will in no way interfere with legitimate price reductions and the discounts will not prejudice the "unregulated" pricing of individual "a la carte" offerings. CFA urges the Commission to find that bundling of pay-per-view or premium channels offered on an "a la carte" basis is "cable programming service" under the 1992 Cable Act, and is therefore subject to rate regulation.

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[117] § 623(l)(2).

[118] § 623(l)(2)(B).

E. THE COMPLAINT PROCESS MUST BE STREAMLINED AND ACCESSIBLE

1. COMPLAINTS NEED NOT PRESENT *PRIMA FACIE* EVIDENCE OF UNREASONABLE RATES

CFA is concerned that the cable industry's comments encourage the Commission to look to other complaint processes such as those applied to telephone companies or broadcasting proceedings when creating the complaint procedures required under the 1992 Cable Act. To the extent that any other complaint procedures employed by the Commission includes a requirement that the complainant provide prima facie evidence, it must be rejected as inappropriate for use under the Cable Act.[119] The Commission must be cognizant of any attempt to impose a greater burden on the complainant than intended by Congress.

2. THERE IS NO NEED FOR ADDITIONAL CONFIDENTIALITY REQUIREMENTS

The issue of confidentiality of information used in the rate review is raised by several cable industry filings.[120] The complaint proceeding under the 1992 Cable Act must be adversarial

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[119] See Conference Report at 64. "The requirement that a complaint must demonstrate a 'prima facie case' is not included [in the Conference Report]."

[120] See e.g., Continental Cablevision at 57; Cablevision Industries at 78; Cox at 64.

in nature. CFA recognizes that gathering some confidential information may be necessary for the Commission to investigate rates. However, we believe the confidentiality rules already in place will adequately protect cable operators against disclosure of confidential proprietary information.[121] Continental Cablevision and Cablevision Industries' comments seek an expansion of secrecy that is totally inappropriate for rate setting proceedings.

Cablevision Industries does not believe complainants are entitled to an adversarial type proceeding with due process rights.[122] This approach inappropriately makes the Commission simultaneously both judge and complainant. This is inconsistent with regulatory procedures and the Act's complaint process. Once Congress decided to provide an open process for all subscribers to seek redress, it would be unreasonable to block parties with a vested interest in the outcome of their complaints from obtaining all relevant information or rebutting cable operators' claims.[123]

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[121] <u>See</u> 47 C.F.R. 0.457 <u>et.</u> <u>seq.</u>

[122] Cablevision Industries at 81.

[123] Cox at 78 and Cablevision Industries at 81 assert the Act gives no standing to prosecute claims to subscribers, only to bring claims to the Commission. At that point, they say, the Commission is the acting party. CFA believes this view ignores Congress' recognition that subscribers are the aggrieved parties, and they (along with franchising authorities) have been given a right of action against the operator. Case law also supports a broader role for subscribers. <u>See</u> e.g., <u>Lynchburg Gas Co. v. Federal Power Comm'n.</u>, 336 F 2d 942, 945 (D.C. Cir. 1964) ("There is aggrievement when a customer's rate is increased, or other economic injury is likely to flow from the action sought to be

While not advocating actual removal of the complainant from the complaint process, Continental Cablevision advocates adding in all instances, significant unwarranted confidentiality requirements which would have similar effects.[124] Included in the Continental proposal is a requirement that complainants acting as their own counsel should only be permitted to view restricted information in camera at the Commission.[125] This would obviously prevent a large majority of complaining subscribers from meaningful participation in the complaint proceeding.

CFA believes these additional restrictions are completely unnecessary because both the Freedom of Information Act and the Commission have their own confidentiality provisions already in place. The existing confidentiality rules offer adequate protection to cable operators without sacrificing the ability of

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reviewed,"); Office of Communication of the United Church of Christ v. FCC, 359 F 2d 994, 1000-06 (D.C. Cir. 1966) (television viewers and listeners have standing to represent public interest in license renewal proceedings).

[124] "Confidential submissions should be permitted pursuant to the standards of 47 C.F.R. 0.459, so long as the Commission explains that: (1) all rate submissions are to be treated as 'required to be filed;' (2) in cases of confidential business information or matters of personal privacy, protective orders shall be agreed upon in advance of submission; (3) such materials shall be prohibited from disclosure under FOIA or counterpart law; (4) such materials shall be disclosed only to lawyers and expert witnesses and for purposes of that proceeding only." Continental Cablevision at 57.

[125] Id.

the Commission to carry out its responsibilities under the complaint process mandated by the 1992 Cable Act. In addition, the Commission may add additional confidentiality requirements on an as needed, case-by-case basis. The Commission must reject any attempts by the cable industry to hide information relevant to regulatory determinations, behind an overly broad cloak of confidentiality.

F. LEASED ACCESS MUST BE ON TERMS AND CONDITIONS THAT MAKE IT TRULY ACCESSIBLE

1. MIGRATION OF CABLE PROGRAMMING TO LEASED ACCESS IS NOT A MAJOR THREAT TO THE INDUSTRY NOR IS IT TO BE DISCOURAGED BY REGULATION

The cable industry's overriding concern regarding the implementation of the leased access provisions under the 1992 Cable Act seems to be the issue of migration of programming from cable channels to leased access channels.[126] The comments indicate the industry wants the Commission to take steps to prevent any migration of programming because it would adversely affect the financial condition of the cable system. CFA believes the industry's arguments misrepresent the effects of migration on

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[126] See e.g., Comments of Continental Cablevision at 81; Comments of NCTA at 87; Comments of Comcast at 52; Comments of Cox at 37; Comments of TCI at 71; Comments of Time Warner at 94; Comments of Cablevision Industries at 42.

a cable system and ignore other relevant statutory purposes.

CFA believes that migration or the threat migration of programming from the cable system to leased access channels is entirely overstated by the industry. Congress had the twin goals of promoting greater diversity of programming and distribution of that programming when it amended this portion of the 1984 Act.[127] CFA believes healthy competition is the best way to reach these goals. Migration is, in essence, competition to the cable operator. Giving programmers a second means of distribution will help discipline the bargaining process between operators and programmers.

Migration will not adversely affect the financial condition or future development of the cable system *per se*. At a minimum, cable operators will be permitted recovery of their costs and a reasonable profit for leased access channels. What concerns the cable industry about competition from leased access channels is that it will bring an end to the unchecked monopoly profits they derive from packaging (i.e., bundling) programming. If the market dictates that it is to the benefit of programmers to pursue leased access rather than traditional carriage agreements, so be it. Relying on the marketplace to the fullest extent

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[127] § 612(a).

possible is also one of the policy goals of the 1992 Cable Act.[128]

Industry claims that migration does not further the goal of increased diversity of programming shows a myopic view of migration. Migration to leased access channels will free up channel capacity on systems which will make way for new programming. Furthermore, the number of channels which must be devoted to leased access is expressly limited under the Act.[129] Ultimately, Congress' goal of diversity will be furthered by permitting the programming market to function more like a competitive market.

The cable industry comments encourage the Commission to prevent migration by setting rates for leased access so high that these channels would not be able to compete with the cable system in delivery of programming at all. Most of the industry comments recommend setting the maximum allowable price for leased access channels at a rate "...no lower than the highest implicit access fees that are currently being charged to programmers on non-leased access channels."[130] The goal of the industry is to have the Commission set the maximum ceiling high enough to enable the

[128] § 2(b)(1)-(2).

[129] § 612(b)(1).

[130] Comments of Time Warner at 101; See also e.g., Comments of Comcast at 55; Cox at 38; NCTA at 92.

operator to prevent anyone from using leased access channels to compete against the cable company.[131] In essence, the cable industry claims any competition from leased access channels will have adverse financial effects on the industry, and must not be permitted. This clearly does not reflect Congress' intent.

This is, in fact, the opposite effect Congress intended. In essence, this does what the cable operators themselves have done since 1984: price leased access channels so high that they are not a realistic alternative to the cable system itself. If the Commission adopts a ceiling that is too high, the operators will continue to be able to frustrate Congress' intent. CFA urges the Commission to reject the cable industry's pricing scheme and recognize that migration has substantial benefits for subscribers and programmers alike with no significant harm to the economic viability of cable systems.

2. SPECIAL RATES FOR NON-PROFIT PROGRAMMERS ARE PERMISSIBLE

CFA reiterates the arguments made at p. 151 of its comments that the Commission has the authority to further Congress' intent through a reduced maximum ceiling on rates for qualified non-

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[131] Under this scheme, prices would be too high for any programmer unless the cable operator negotiated a special rate below the maximum allowable ceiling. It is unlikely that a cable operator would strike such a deal, as evidenced by the fact that operators have set unreasonable rates preventing programmers from using leased access channels.

profit programmers.[132] The same power that gives cable operators the ability to charge different prices based on the nature of the programming,[133] gives the Commission the authority to set a different maximum rate ceiling for qualified non-profit programmers in an effort to carry out Congress' intent.[134] CFA urges the Commission to adopt, where necessary lower maximum rate ceilings for qualified non-profit programmers.

3. THE COMMISSION MUST ESTABLISH REASONABLE TERMS AND CONDITIONS FOR USE OF LEASED ACCESS CHANNELS

It is abundantly clear from the cable industry comments that cable operators intend to erect as many roadblocks to the development of increased leased access channel use as possible. The oppressively high maximum rate ceilings[135] the industry seeks, forcing part-time users to pay for the entire program day along with requirements that programmers pay all fees up-front or

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[132] CFA advocates limiting the non-profit subsidy to those organizations which meet a needs test set up by the Commission. See Comments of CFA at 152.

[133] H.Rep. 98-934 at 51.

[134] Claims by the cable industry that PEG channels eliminate the need for special non-profit rates ignores the realities of PEG channel use and the legislative history of the Act. PEG channels will in no way provide a forum for competition to the cable system.

[135] Several industry comments seek a percentage of advertising and other revenues in addition to rates set at levels high enough to recover "lost opportunity costs". The Commission is required under the Act to prevent these attempts to obstruct Congress' expressed intent.

provide a surety bond, bears this out.[136] CFA urges the Commission to establish fair standards for all types of leased access, to prevent circumvention of the leased access provision.

G. THE CABLE INDUSTRY'S EFFORTS TO RESTRICT THE COMMISSION'S REFUND AUTHORITY SHOULD BE REJECTED

At least two cable industry filings seek to negate the Commission's refund authority by permitting reconfiguration of tiers to reach a benchmark level or adding services to a tier instead of actual refunds.[137] CFA believes that neither of these options is a "refund" as intended by Congress under the Act, and must be rejected by the Commission.

Under the Act, the Commission must establish, by regulation, "...procedures to be used to reduce rates for cable programming services that are determined by the Commission to be unreasonable and to refund such portion of the rates or charges that were paid by subscribers..."[138] CFA believes the Act clearly intends for the Commission to establish refund procedures which require

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[136] The suggestion by Continental Cablevision at 85 that leased access channels meet higher technical standards than PEG channels also illustrates the extent the industry will go to prevent competition from developing.

[137] See Comments of NCTA at 77; Comments of Continental Cablevision at 57.

[138] § 623(c)(C). (emphasis added)

actual payment of the amount of overcharges to subscribers.[139] In most cases, refund checks or rate deductions should be given to the actual subscribers that were victims of the cable operator's abuse. In certain limited cases where the Commission determines it would be too burdensome to issue refunds to the actual subscribers affected, the Commission could require reductions in charges to an entire class of current subscribers equal to the total amount of overcharges.[140]

The proposals set forth by NCTA and Continental Cablevision are not refunds at all, and were not contemplated as an adequate substitute by Congress. In essence, the cable industry which continually cautions the Commission not to make qualitative judgments about programming, is putting the Commission in the position of evaluating new programming offered in lieu of actual refunds. CFA believes these proposals are disingenuous, do not reflect Congress' intent and must be rejected outright by the Commission.

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[139] Cablevision Industries at 82 suggests rate refunds be required only after all remedies available to the cable operator are exhausted. This would permit "indefinite loans" from subscribers if the rates were determined unreasonable. Furthermore, such a requirement is at odds with the practices of other federal agencies. See e.g., 18 C.F.R. §154 67(c) (Federal Energy Regulatory Commission rules provide refunds for gas pipeline rate overcharges are refunded at such time and in such amounts as required after final order of the Commission.) CFA advocates a similar approach here.

[140] CFA believes any former subscribers who identify themselves to the cable operator should also be entitled to a full refund for the time period they were subscribers.

H. THE NEGATIVE OPTION BILLING PROHIBITION MUST BE INTERPRETED BROADLY BY THE COMMISSION

CFA agrees with the cable industry that revenue neutral changes to program tiers without notice to the subscriber are not a violation of § 623(f) of the 1992 Cable Act. However, several industry filings go much further and disregard the plain language of the negative option billing provision. These comments state that based on a statement made on the floor of the Senate[141], this provision is meant to apply only to offering an entirely new pay service without affirmative consent by the subscriber.[142]

This limited interpretation of the provision misrepresents Senator Gorton's floor statements and simply ignores the language actually used in the Act.[143] The Act defines negative option

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[141] See e.g., Comments of Continental Cablevision at 67; Comments of Tele-Communications, Inc. at 64; Comments of Time Warner at 79 all citing Statement of Sen. Gorton...

[142] In its comments, Time Warner states that under the Act, a "[n]egative option only occurs when a subscriber is delivered, and billed for an entirely new service or package of services which were not previously part of the services delivered to that subscriber, and which the subscriber has not affirmatively requested by name." Comments of Time Warner at 85. This interpretation ignores the plain language of the statute and attempts to create a definition the cable industry would prefer.

[143] While Sen. Gorton did mention the marketing tactic used with respect to "Encore" by TCI specifically, he went on to add, "I am aware of other negative options used such as cable programming guides, equipment, and shuffling of services which are also intended to be covered by this provision." This is clearly a more expansive view of the negative option billing provision than the cable industry would have the Commission

billing as charging "a subscriber for any service or equipment that the subscriber has not affirmatively requested by name." The provision goes on to add that "a subscribers failure to refuse a cable operator's proposal to provide such service or equipment shall not be deemed to be an affirmative request for such service or equipment."[144]

Although it is clear that members of Congress were disturbed by the type of negative option billing practiced by TCI through it's "mini-pay" service, neither the statutory language, the Conference, House and Senate Reports, nor the floor statement cited indicates any intent by Congress to limit the application of this provision to a single form of negative option billing.[145]

Several other cable industry filings state that the Commission need not create specific regulations under this

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believe. 138 Cong. Rec. 14248 (daily ed. Sept. 21, 1992)(Statement of Sen. Gorton).

[144] § 623(f).

[145] The action taken by TCI which caused the uproar began when TCI offered a new "mini-pay" movie channel called Encore. TCI began offering this channel to its subscribers at no charge. After several months passed, subscriber would be billed one or two dollars per month for the service unless they affirmatively contacted the cable operator to tell them they did not want the service. There was tremendous public outcry against these types of pricing practices.

subsection of the Act.[146] This interpretation completely disregards the express directives of § 623 which requires that the Commission establish <u>regulations</u> to prevent this behavior. CFA urges the Commission to disregard the cable industry's attempts to rewrite and limit this provision, and instead establish regulations which follow the clear and unambiguous statutory language prohibiting negative option billing found at § 623(f) of the Act.

I. THE APA HAS BEEN SATISFIED WITH THE PUBLICATION OF THE NOTICE OF PROPOSED RULEMAKING IN THIS PROCEEDING

Cox Cable claims that the inability of the cable industry to comment on the Commission's regulations before they are put into place raises "serious procedural questions under the Administrative Procedures Act..."[147] However, under the Administrative Procedures Act (APA)[148] and the case law interpreting it, this claim is absolutely without merit.

All that is required to be contained in the Rulemaking Notice by the Commission under § 553 of the APA is "either the terms or substance of the proposed rule <u>or</u> a description of the

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[146] <u>See</u> e.g., Comments of Cox, Comcast, Cablevision Industries.

[147] <u>See</u>; Comments of Cox at 6.

[148] 5 U.S.C. § 551 et seq.

subjects and issues involved."(emphasis added).[149] The APA goes on to add, "After notice...the agency shall give interested persons an opportunity to respond through submission of written data, views or arguments..."[150] CFA believes the exhaustive notice put out by the Commission in the Rate Regulation Rulemaking would surely exceed this requirement.

The case law indicates that the Commission need only give interested parties an opportunity to participate through proper notice and an opportunity to respond to the issues raised in the notice.[151] Even if the final regulations differ from those proposed, as long as they are a "logical outgrowth" of the notice, they will be upheld, and commenters will be considered to have had adequate opportunity to respond.[152]

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[149] See; APA at § 553(b).

[150] APA at § 553(c).

[151] See e.g., California Citizens Band Association, Inc. v. United States, 375 F.2d 43, 50 n. 11, (1967) ("[T]he APA only requires the agency to give interested persons an opportunity to participate in the Rule making through submission of written data, views or arguments with or without opportunity for oral presentation.") (emphasis added) citing Superior Oil Company v. Federal Power Commission, 322 F.2d 601, 608-09 (9th Cir.); American Mining Congress v. E.P.A., 965 F.2d 799 (9th Cir. 1992) ("The notice should be sufficiently descriptive of the 'subjects and issues' involved' so that interested parties may offer informed criticism and comments." citing Ethyl Corp. v. E.P.A, 541 F.2d 1, 48 (D.C. Cir. 1976).

[152] Shell Oil Co. v. E.P.A., 950 F2d 741 (D.C. Cir. 1991) ("An agency, of course, may promulgate final rules that differ from the proposed regulations. To avoid the 'absurdity that ... the agency can learn from the comments on its proposals only at the peril of starting a new procedural round of commentary,' International Harvester Co. v. Ruckelshaus, 478 F2d 615, 632 n.

There is no question that the cable industry and the rest of the public has been given adequate notice and opportunity to respond under the APA. CFA believes the law is clear, and the industry need not be given an additional opportunity to respond to the final version of the regulations set forth by the Commission prior to implementation.

VI. THE EMPIRICAL RECORD ON INDUSTRY PERFORMANCE SUPPORTS CFA'S VIEW OF THE REGULATORY EXPERIENCE

Throughout their comments the cable industry invokes a number of economic characteristics of the industry to defend the effort to restrict regulation. As we pointed out in our original comments, the industry takes basic facts and twists then by utilizing the wrong basis for comparison, truncated time period of analysis, and other devices to distort the correct image of industry performance. The basic facts, however, cannot be fully disguised. We find that in their filings, cable has made many admissions which provide extensive support for CFA's view of the industry.

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51 (D.C. Cir. 1973)], we have held that final rules need only be a 'logical outgrowth' of the proposed regulations."

A. THE CABLE INDUSTRY HAS MISREPRESENTED THE ECONOMIC PERFORMANCE UNDER REGULATION IN COMPARISON TO DEVELOPMENTS SINCE DEREGULATION

1. SYSTEM GROWTH IS MISSTATED

NCTA's recounting of the history of cable rates is simply inaccurate. Cable's expansion is claimed as one of the great accomplishments of deregulation and proof that abuse is absent.[153] Neither is the case. As we demonstrated in our initial comments, expansion took place before and after deregulation.[154] In a declining cost industry with a low elasticity of demand and a positive income elasticity, expanding penetration is not proof that abuse is absent.[155]

Time Warner's consultant repeats the same mindless recitation of facts in an effort to blunt FCC regulation of cable rates. The fact that the industry expanded after deregulation is invoked to suggest that the Commission cannot impose serious regulation on the industry. However, the fact that the industry

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[153] Comments of NCTA at 21.

[154] See Comments of CFA at 40-51.

[155] Comments of Time Warner, Kelley Attachment at 3.

expanded under regulation is totally ignored. Therefore, the conclusion that reregulation will starve the industry is baseless.

CFA documented the fact that one can discern little if any change in patterns of expansion before and after deregulation in terms of homes passed, channels and subscribers.[156] Many of the industry comments harp on post-deregulation changes in programming. However, their own data refute their argument that regulation stifled the growth of new programming.

TCI's consultants provide the data in Figure R-2. It shows a virtual steady rise in programming before and after the 1984 Cable Act. In fact, the TCI consultants provide data on the key industry characteristics we have discussed previously which support CFA's conclusion that the industry grew as much before deregulation as after.[157]

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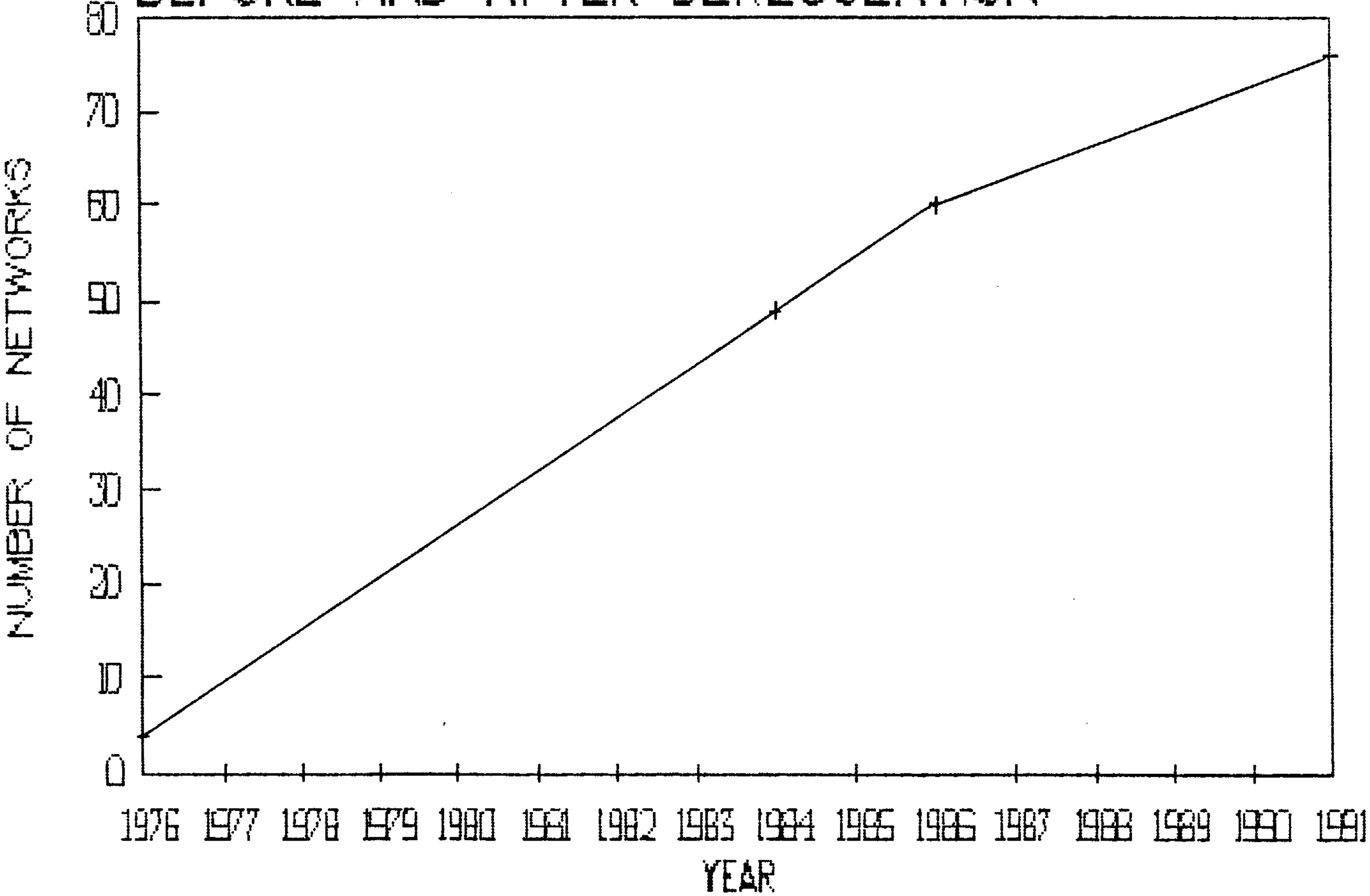
[156] See Comments of CFA at 41-52.

[157] Besen, op. cit., at 8-13.

FIGURE R-2:
NATIONAL CABLE VIDEO PROGRAM NETWORKS
BEFORE AND AFTER DEREGULATION



BESEN, BRENNER AND WOODBURY, AN ANALYSIS OF CABLE
TELEVISION RATE REGULATION, JANUARY 27, 1993

2. DECLINING COST RESULTS FROM SPREADING FIXED COST OVER INCREASING NUMBERS OF SUBSCRIBERS

The industry also clearly exhibits declining costs with system expansion. As the number of subscribers increases and penetration rate rises, the cost per subscriber declines:

> These promotions induce increased subscribership at increased service levels and thus help to spread the heavy fixed costs over a greater number of subscribers.[158]

B. THE RECORD OF REGULATION HAS BEEN DISTORTED BY THE CABLE INDUSTRY

1. THE HISTORICAL FRAME OF REFERENCE IS WRONG

The industry's direct discussions of regulation are faulty. NCTA says "all evidence indicates that city councils and other regulators suppressed cable rates significantly below such levels.[159] NCTA cites no evidence, however. Rather, it notes that between 1972 and 1986 cable rates declined in real terms.

In fact, the evidence which CFA provided shows that (1)

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[158] Comments of Time Warner at 77.

[159] Comments of NCTA at 20.

regulation has not held rates even to competitive cost levels and (2) that the declining cost characteristics of the industry account for the declining real cost of cable service.[160] In short, before deregulation cable subscribers got a reasonably fair deal, yet since deregulation, they have been ripped off by the exercise of market power. There is simply no evidence to the contrary.

TCI and its consultant are totally pre-occupied with pre-1976 content-based regulation. In fact, their own data show a flowering of the industry under the rate regulation of the 1976-1984 period.[161]

Continental even admits that regulation did not impede the industry's ability to raise capital.

> The cable industry has demonstrated its ability to raise large amounts of capital very cost effectively over many years spanning both rate regulation and deregulation.[162]

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160 See Comments of CFA at 17-28, 40-70.

161 Besen, op. cit., 8-13.

162 Continental, Appendix B, at 9.

2. THE CONTEMPORARY FRAME OF REFERENCE IS WRONG

Continental, in particular, as well as the cable industry in general, spend a great deal of time arguing that the cable industry is not like the telephone industry. Continental's consultants present a series of financial and other data purporting to show that the telephone companies are rich compared to the cable industry.

The failure of regulators to properly restrain Regional Bell Operating Company profits and to police their behavior has been a source of major concern to us.[163] We have previously pointed out to the Commission that earnings are far too high by historical standards, revenue streams have been mis-used, and anti-competitive and anti-consumer behavior has been rampant in the local telephone industry. Therefore, pointing to the RBOCs proves nothing about cable.

Moreover, and more importantly, the cable industry fails to note that the FCC regulates only a small part of the LEC industry. The overwhelming public influence on LEC economic performance comes from state regulation. In fact, Continental's filing fails to even refer to the companies that the FCC influences most -- the long distance carriers.

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[163] Dr. Mark N. Cooper, Divestiture Plus Eight, Dec. 1991.

C. CABLE OPERATORS ADMIT THE ECONOMIC UNDERPINNINGS OF CFA'S ANALYSIS OF INDUSTRY PERFORMANCE

Thus, the industry's scare tactic -- regulation automatically means stagnation -- has no basis in the experience of the industry. The underpinnings of a sound regulatory approach must recognize the dynamic nature of costs in the industry. At various points, cable industry comments admit the key factors on which CFA based its regulatory proposal to the Commission.

1. PRODUCTIVITY IMPROVEMENTS ARE LINKED TO INCREASING CHANNEL CAPACITY

The industry admits that expanding channel capacity is a crucial factor leading to declining cost and prices:

> Any system for which the basic tier has remained the same and constant over these time periods is exceptional. Per-channel benchmarks will account for some, but not all of this need for adjustment because per channel costs often decline as the number of channels rises.[164]

> In general, price per channel in the industry tends to fall as the number of channels on a system increases.[165]

> With declining average (per channel) cost, marginal cost will be less than average cost, so that some programmers must pay an implicit access fee that

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[164] Comments of Time Warner at 23.

[165] Kelley, op. cit., at 28.

> exceeds the marginal cost of a channel if total costs are to be covered.[166]

2. TRADITIONAL BASIC BUNDLES MUST BE CAREFULLY IDENTIFIED

Cable companies admit that basic cable service has traditionally encompassed a large number of popular, national cable networks. It is this precise fact that CFA relied upon in devising a price constraint to prevent retiering harm in the regulatory model we proposed to the Commission. NCTA makes the case for a "quality index" and special pricing limits for the "top 30" network cable networks:

> While the term "basic service" now has new statutory significance, it has often, in the past, been used to mean "non-premium service." For example satellite networks such as CNN, ESPN, Arts & Entertainment, MTV and the Weather Channel have typically been referred to as "basic cable networks, as distinguished from "premium" networks such as Home Box Office, Showtime and the Discovery Channel.[167]

3. THE MECHANICS OF BUNDLES AS CAPS REQUIRES CLOSE SCRUTINY

The mechanics of identifying unreasonable rates for cable programming services are similar in our benchmark approach to that taken by NCTA. That is, we agree that a bundle should be

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166 Besen, op. cit., at 54.

167 Comments of NCTA at 37.